Filed 7/24/20 In re D.R. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re D.R., a Person Coming Under the Juvenile Court Law.	B300617 (Los Angeles County Super. Ct. No. YJ39550)
THE PEOPLE, Plaintiff and Respondent, v. D.R., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Irma J. Brown, Judge. Reversed in part, affirmed in part, and remanded with directions.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

D.R. appeals from an order of the juvenile court sustaining a petition pursuant to Welfare and Institutions Code[1] section 602. The four-count petition alleged that appellant, a minor, committed multiple assaults against Moises A. with various deadly weapons in violation of Penal Code section 245, subdivision (a). Count 1 alleged an assault with a hockey stick, count 2 alleged an assault with a skateboard, count 3 alleged an assault with a stick, and count 4 alleged an assault with a knife. All four counts carried a gang allegation under Penal Code section 186.22, subdivision (b)(1)(B). The juvenile court sustained all four counts of the petition, but dismissed the gang allegations. The juvenile court also sustained a second petition alleging a misdemeanor battery against appellant's mother. As to both petitions, the court declared appellant a ward of the court and placed him on home probation with various terms and conditions.

Appellant contends the evidence was insufficient to support the juvenile court's true finding that appellant committed an assault on Moises with a knife. He further asserts, and respondent agrees, that count 1 or count 3 must be reversed because there was only one assault on Moises with a stick, and remand is required to allow the juvenile court to make the requisite finding under Welfare and Institutions Code section 702 as to whether the offenses were misdemeanors or felonies.[2] We

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

[2] In his reply brief, appellant states that the issue has been forfeited under *In re G.C.* (2020) 8 Cal.5th 1119 (*G.C.*) because

reject appellant's substantial evidence claim, but reverse the juvenile court's true finding on count 1 and remand the matter with directions that the juvenile court make the requisite findings under section 702 as to whether the offenses in the remaining counts were misdemeanors or felonies.

FACTUAL BACKGROUND

On January 23, 2018, Moises was walking home from school with his friends, Ruben and Angela, when they heard appellant, Kevin, Roberto, and Ariel whistling and screaming at them. Appellant had a knife, Roberto had a long curved stick, Kevin was carrying a knife and a skateboard, and Ariel had a plastic shopping basket. Moises and his friends arrived at the house, but were unable to find the key to open the gate. As Moises turned to see if appellant and his friends were nearby, Kevin struck him in the stomach with a skateboard. Moises and Kevin began to fight, and Ruben picked up a wooden stick and hit Kevin in the head with it. During the struggle with Kevin, Moises knocked a switchblade out of Kevin's hand.

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there was no objection to the juvenile court's failure to designate the offenses as felonies or misdemeanors. However, *G.C.* involved a failure to timely appeal a disposition in which the juvenile court failed to make the finding under section 702. (*Id.* at pp. 1122–1123.) The high court did not abrogate its decision in *In re Manzy W.* (1997) 14 Cal.4th 1199 (*Manzy W.*); to the contrary, it reaffirmed its holding in *Manzy W.* and stated that in the ordinary case in which a timely notice of appeal has been filed, the appellate court should remand when the juvenile court fails to make an affirmative declaration on the record as to whether the offense is a felony or a misdemeanor. (*G.C.*, at p. 1125.)

At some point, Moises saw that Roberto had a long metal stick approximately 18 to 24 inches long,[3] and appellant had a pocketknife. Roberto came up and hit Moises in the head with the stick, while appellant, Kevin, and Ariel "jump[ed]" Ruben. As a result of the blow to his head, Moises fell to the ground and briefly lost consciousness. Appellant kicked Ruben while pointing a knife at him. When Moises was able to get up, he saw appellant fold his knife closed.

As a result of the attack, Moises was hospitalized with a skull fracture.

DISCUSSION

I. The Evidence Was Sufficient to Support the Juvenile Court's Finding on Count 4 that Appellant Aided and Abetted an Assault on Moises With a Knife

Appellant contends the evidence was insufficient to support the juvenile court's true finding that he committed an assault on Moises with a knife. We disagree.

In an appeal challenging the sufficiency of the evidence to support a juvenile court judgment sustaining the criminal allegations of a petition made under section 602 of the Welfare and Institutions Code, our review is governed by the same standard of review that applies in an adult criminal case. (*In re V.V.* (2011) 51 Cal.4th 1020, 1026 (*V.V.*); *In re I.A.* (2020) 48 Cal.App.5th 767, 778 (*I.A.*).) That is, "we determine whether substantial evidence—'evidence that is reasonable, credible, and of solid value'—supports the juvenile court's findings. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).)" (*I.A.*, at

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[3] Ruben identified the weapon as a "hockey stick," while Angela simply described it as a big heavy stick.

p. 778.) "We view the evidence 'in the light most favorable to the prosecution and presume in support of the [findings] the existence of every fact the [court] could reasonably have deduced from the evidence.' " (*I.A.*, at p. 778, quoting *Zamudio*, at p. 357.)

Our role is limited to determining " ' "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' " (*V.V.*, *supra*, 51 Cal.4th at p. 1026.) " ' " 'However, substantial evidence is not synonymous with any evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal.' " ' " (*In re J.A.* (2020) 47 Cal.App.5th 1036, 1046.) Nevertheless, we accept any logical inferences the court might have drawn from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) And in the final analysis, "[a] reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the [court's] verdict." *Zamudio*, *supra*, 43 Cal.4th at p. 357; *I.A.*, *supra*, 48 Cal.App.5th at p. 778.)

Assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) "An assault occurs whenever ' "[t]he next movement would, *at least to all appearance*, complete the battery." ' [Citation.] Thus, assault 'lies on a definitional . . . *continuum of conduct* that describes its essential relation to battery: An assault is an incipient or inchoate battery; a battery is a consummated assault.' " (*People v. Williams* (2001) 26 Cal.4th 779, 786 (*Williams*); *People v. Colantuono* (1994) 7 Cal.4th 206, 216–217.)

Appellant correctly maintains there was insufficient evidence to support a conclusion that appellant himself used a knife against Moises, and respondent acknowledges that the testimony on the subject was "somewhat murky." However, as respondent argues, there was substantial evidence to support the true finding on count 4 under an aiding and abetting theory based on Kevin's use of a knife in his attack on Moises. The juvenile court specifically noted that Kevin had a skateboard and a knife during the assault on Moises. Ruben testified that Kevin had a switchblade in his hand when he started the attack on Moises, but Moises knocked it out of his hand during the fight. Angela also testified that Kevin had a knife.

Applying the *Williams* test for assault to these facts, the question is whether a reasonable person, viewing the facts known to Kevin during his attack on Moises, would realize that the wielding of the knife would directly, naturally, and probably result in a battery on Moises. (*Williams*, *supra*, 26 Cal.4th at p. 788; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 459.) With the answer to that question being a resounding yes, the conclusion that Kevin assaulted Moises with a knife is inescapable. Appellant concedes that his actions unquestionably aided and abetted Kevin's assault on Moises with the skateboard. The evidence also clearly supports a true finding on count 4 that he aided and abetted Kevin's assault on Moises with the knife.

II. The Evidence Shows that Appellant Aided and Abetted Only One Assault Against Moises With a Stick; Accordingly, Count 1 Must Be Reversed

Appellant contends that the evidence established he aided and abetted only one assault against Moises with some sort of

stick, and that either count 1 or count 3 must be reversed. We agree.

Count 1 of the petition alleged that appellant assaulted Moises with "a deadly weapon, to wit, [a] HOCKEY STICK." Count 3 alleged he assaulted Moises with a "STICK." Both counts were prosecuted on an aiding and abetting theory based on Roberto's act of striking Moises on the head with what was variously described as a "hockey stick" or simply a "stick." There was no evidence that Roberto possessed or used any other weapon, or that appellant, Kevin, or Ariel possessed or used any kind of stick to assault Moises. Indeed, the discrepancies between Moises's description of a two-foot long, curved, metal "stick," Ruben's characterization of the weapon as a "hockey stick," and Angela's description of Roberto's weapon as a big heavy "stick" appear to be ordinary variations in the witnesses' descriptions of the appearance of the same object. Even the prosecutor acknowledged "it was unclear what stick Roberto had. It was some type of stick that Roberto had that was used against Moises."

There was certainly abundant evidence that Roberto assaulted Moises with a stick used as a deadly weapon. But there was no evidence of more than one stick or more than one attacker wielding a stick against Moises. Counts 1 and 3 thus describe the same assault by the same person against the same victim using the same deadly weapon. Accordingly, the juvenile

court erroneously sustained both counts, and the true finding as to count 1 must be vacated.[4]

III. Remand Is Required for the Juvenile Court to Make a Finding as to Whether the Offenses Are Misdemeanors or Felonies

Appellant contends remand is required for the juvenile court to declare whether the offenses are misdemeanors or felonies. Respondent concedes the point, and we agree.

The juvenile court ruled that appellant committed four violations of Penal Code section 245, subdivision (a)(1). The offense is a "wobbler"; that is, the court has discretion to treat it as a felony or a misdemeanor.[5] (Pen. Code, § 17, subd. (b); *In re Jose T.* (1997) 58 Cal.App.4th 1218, 1220.)

Welfare and Institutions Code section 702 provides in relevant part: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." Our Supreme Court has held "[t]he language of the provision is unambiguous. It requires an explicit declaration by the juvenile court whether

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[4] Without describing the object, Ruben characterized the weapon as a "hockey stick," whereas the other witnesses actually described the object. Because the evidence merely established the weapon to be a generic "stick," sufficient evidence supports the true finding as to count 3 but not count 1.

[5] A person convicted under Penal Code section 245, subdivision (a)(1) "shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment."

an offense would be a felony or misdemeanor in the case of an adult." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1204.) The high court has declared that "[i]t is well established that section 702's requirement is 'obligatory' rather than 'merely "directory" ' (*Manzy W., supra*, 14 Cal.4th at pp. 1204, 1207) and requires an explicit declaration (*id.* at p. 1204). It is not sufficient that the offenses were identified as felonies in the wardship petitions and in the minute order of the jurisdictional hearing, or that they were treated as felonies for purposes of calculating the maximum term of confinement." (*G.C.*, *supra*, 8 Cal.5th at p. 1125.)

Manzy W. further held that the juvenile court's failure to make the mandatory express declaration pursuant to section 702 requires remand unless the record affirmatively shows that "the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.) "The key issue," the court explained, "is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Ibid.*)

Here, the juvenile court declared only that appellant had committed the charged offenses without any statement about whether the offenses were felonies or misdemeanors. Because the record contains no indication that the juvenile court was aware of and exercised its discretion in this regard, its failure to comply with the section 702 mandate requires remand to the juvenile court.

DISPOSITION

We reverse the juvenile court's true finding on count 1 (assault with a deadly weapon—hockey stick), and affirm the true findings on count 2 (assault with a deadly weapon—skateboard), count 3 (assault with a deadly weapon—stick), and count 4 (assault with a deadly weapon—knife). The matter is remanded with directions that the juvenile court make the requisite findings under Welfare and Institutions Code section 702 as to whether the offenses in the remaining counts were misdemeanors or felonies. In all other respects the order under review is affirmed.

NOT TO BE PUBLISHED

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.